

telecommunications network is contrary to the Commission's settled policies: "[w]e have long recognized that the basic network is a unique national resource, and our policies have been designed to promote nondiscriminatory utilization of that resource's capabilities."⁴⁶ While the Commission has declined to provide enhanced service providers with broad collocation rights, it based that decision on the finding that equal access could be achieved in other ways and that "collocation merely reduces transmission costs, it does not address the more general issues of equal functionality"⁴⁷ In the 1986 Computer III proceeding, however, the Commission could not have anticipated the advent of xDSL technologies, and its inherent distance limitations. With xDSL, collocation becomes a very real issue of "equal functionality," which cannot be resolved through minimizing transport costs.⁴⁸

The U S West Petition vaguely claims that it offers "the data telecommunications services discussed in this petition on an equal basis to all Internet service providers."⁴⁹ This requires further explanation. CIX emphasizes that the deployment of xDSL technologies *must be reconciled* with the Commission's long-standing policies favoring vibrant competition in the information services markets, and the need to ensure that ILECs do not use their monopoly control over the local loop and central office facilities to create a discriminatory advantage for their own information services. Obviously, CIX prefers a practical solution to this issue -- a solution that gives all ISPs the same access to ILEC xDSL and that covers the same geographic market.

⁴⁶ Id.

⁴⁷ Id. at 1038.

⁴⁸ Cf., id. at 1042.

⁴⁹ U S West Petition at 5.

C. *U S West Fails To Identify The Improvements to the Internet Backbones It Would Make*

To a large extent, U S West seeks regulatory relief on the promise that it "would be able to deploy greater bandwidth to many additional smaller markets alleviating the network congestion rural ISPs and subscribers face" Petition at 30. It then fails to describe:

- (1) What are the levels of increased investment that U S West commits to?
- (2) Over what time-frame will U S West make this commitment?
- (3) What is U S West's specific plan for improving on Internet backbones speeds, Network Access Point congestion, Website telecommunications access issues, connectivity between ISPs?
- (4) Does U S West intend to use its interLATA facilities built or acquired now to transport voice telephony, even after it receives Section 271 approval? If so, then the Petition would essentially provide U S West with the ability to build its interLATA voice network prior to Section 271 approval.
- (5) Why it is that it makes economic sense for them when no other carriers have done this?

Without answers to these fundamental questions, it is hard to evaluate whether U S West's promises are real or not. If not, then there is no public interest supporting U S West's requests for interLATA authority and other deregulatory relief.

D. *Consideration of The U S West Petition Is Premature*

The Commission has already correctly decided it will implement Section 706 by first initiating a comprehensive rulemaking proceeding, as contemplated under Section 706(b), and not through *ad hoc* company-specific requests for deregulation such as the U S West Petition. "Federal-State Board on Universal Service," First Report and Order, CC Dkt. No. 96-45, 12 FCC Rcd. 8776,

9091 (1997) ("We concur with the Joint Board's conclusion . . . that Congress contemplated that section 706 would be the subject of a separate rulemaking proceeding.").⁵⁰ With a general rulemaking, the Commission and interested parties can consider the regulatory goals to be achieved by Section 706, and what means the Commission should use to achieve those goals. CIX believes that the Commission is correct in holding to its decisions on implementation of Section 706. A general rulemaking avoids the implicit bargaining of *ad hoc* regulatory relief for one technology deployment or another; it also adds a context of regulatory principals to apply to specific decisions.

Therefore, consideration of the U S West Petition is premature because the public and the Commission cannot evaluate such *ad hoc* requests for deregulation until the general rulemaking has been completed.

III. The U S West Petition is Not Authorized By Section 706 of the 1996 Act

U S West requests exemption from four categories of regulatory and statutory obligations:

- (1) "to allow it to build and operate packet-and cell-switched data networks across LATA boundaries,
- (2) to permit it to carry interLATA data traffic incident to its provision of digital subscriber line service,

⁵⁰ "Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996," Order and Notice of Proposed Rulemaking, 11 FCC Rcd. 5937, 5975 (FCC "reserves its right to address the implementation of Subsection 706(a) in a consolidated action"); "Implementation of Local Competition Provisions in the Telecommunications Act of 1996," First Report and Order, CC Dkt. No. 96-98, 11 FCC Rcd. 15497, 16120-21 (1996) (FCC declines to implement Section 706 in its Interconnection Proceeding because "[w]e intend to address issues related to section 706 in a separate proceeding") ("Local Competition Order").

- (3) to forbear from requiring U S West to unbundle for its competitors the non-bottleneck network elements used to provide these data services; and
- (4) to forbear from requiring U S West to make these competitive services available at a wholesale discount for resale."⁵¹

The U S West Petition states that Section 706 authorizes and, indeed, requires the Commission to exercise regulatory forbearance authority as described in the Petition.

CIX believes that the U S West Petition advocates for bad policy decision making. Section 706 does not in any way suggest that the Commission can or should act in the manner so outlined by U S West. U S West asks the Commission to directly contravene the enumerated Section 271 competitive checklist requirements and the Section 272 structural separation obligations. However, nothing in the statutory language of Section 706 even suggests such an unbridled end-run around key competitive safeguards of the 1996 Act.

Instead, Section 706 authorizes the Commission to encourage advanced telecommunications for "reasonable" deployment through regulatory measures that are "consistent with the public interest" and that "promote competition in the local telecommunications market."⁵² The U S West request fails to meet any of these statutory standards because it would: exclude ISPs and CLECs from unbundled access to xDSL network elements; it would eliminate resale of local xDSL telecommunications services while U S West continues to hold a monopoly over local access; retreat from competitive safeguards in place to prevent the ILECs from discrimination on cross-subsidization. In short, U S West asks the Commission to accept an untenable policy trade of local telecommunications competition in exchange for a vague promise of advanced services.

⁵¹ U S West Petition at 1.

⁵² 1996 Act, § 706.

A. *U S West's Requests For InterLATA Authority, Wholesale Resale, Unbundling Obligations Are Not Authorized By the 1996 Act*

1. U S West Fails To Demonstrate That The Commission Has Statutory Authority to Forbear From Sections 271 and 251(c) of the Act

The 1996 Act specifies the manner by which U S West may seek authority to enter the in-region interLATA services market. 47 USC. § 271(c). Section 271 sets out a detailed and specific procedure by which the Commission must evaluate a request for authority to enter either the interLATA telecommunications or information service markets, and obligates the Commission to monitor an RBOC's continuing compliance with the competitive checklist requirements. *Id.* at § 271(d). Thus, Congress has made its position quite clear: compliance with the competitive mandates of the 1996 Act and Section 271 is a necessary prerequisite for U S West to enter the interLATA Internet market.⁵³ Congress further expressed this mandate by specifically foreclosing any Commission action that veers from the express terms of Section 271: "LIMITATION ON COMMISSION -- The Commission may not, by rule *or otherwise*, limit or extend the terms used in the competitive checklist" *Id.* at § 271(d)(4) (emphasis added). See also, Non-Accounting Safeguards Order, 11 FCC Rcd. at 21967 ("If a BOC's provision of an Internet or Internet access service . . . incorporates a bundled in-region, interLATA transmission component provided by the BOC over its own facilities or through resale, that service may only be provided through a Section 272 affiliate, after the BOC has received in-region interLATA authority under Section 271.").

⁵³ CIX notes that U S West's proposed offering could not in any manner be deemed an "incidental interLATA service." Section 271 permits interLATA Internet services only to serve "elementary and secondary schools as defined in section 254(h)(5)." *Id.* at § 272(g)(2); § 272(h) (incidental interLATA service provisions shall be narrowly construed).

U S West's Section 251(c) resale and unbundling obligations are also unequivocal: it has a "duty to provide . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point . . .", and a duty "to offer at wholesale rates any telecommunications service that the carrier provides at retail to subscribers." 47 U.S.C. § 251(c)(3) & (4)(A). Moreover, Congress defined "network element" quite broadly as "a facility or equipment used in the provision of a telecommunications service." *Id.* at § 153(29). Thus, the xDSL equipment and functionalities that are part of U S West's network are subject to Section 251(c) unbundling, and its xDSL resale service is subject to the wholesale resale obligation.

U S West's request for the Commission to forbear from Section 271 and 251(c) is beyond the Commission's forbearance authority, which is expressly limited: "the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Here again, Congress has spoken in plain terms to require U S West to open its local network up to competition, to fully unbundle and resell pursuant to Section 251(c), and to meet the competitive checklist of Section 271 *prior to entering* the interLATA markets.

U S West asserts, however, that the language of Section 706 for the Commission to "utiliz[e] . . . regulatory forbearance," provides a statutory basis to forbear from the requirements of Section 271.⁵⁴ For several reasons, CIX strongly disagrees with this statutory interpretation. Section 706 merely permits the Commission *to utilize* its forbearance authority in order to promote advanced telecommunications deployment. Thus, Congress has articulated a policy in favor of deployment of "advanced telecommunications services," which would factor into the Section 10(a)(3) "public interest" determination in the context of a Section 10 forbearance

⁵⁴ U S West Petition at 39.

proceeding. The source of the Commission's forbearance authority to address this Petition, however, is still Section 10 of the Communications Act, which expressly prohibits the Commission from forbearance in this case. 47 USC. § 160(d).

Moreover, U S West's interpretation of Section 10 is inconsistent with the plain statutory language.⁵⁵ Congress carefully crafted Section 10 to recognize only one other independent source of statutory forbearance authority, as found in Section 332(c)(1)(A) of the Act. *Id.* at §160(a) ("*Notwithstanding section 332(c)(1)(A) of this Act*, the Commission shall forbear from applying any regulation or any provision of this Act" that the Commission finds consistent with the standards of Section 10). Congress did not recognize Section 706 as an independent source of forbearance authority. Surely, if it had been Congress' intention to create an independent basis for regulatory forbearance under Section 706, then Section 10(a) would have been crafted to expressly reference both Section 332(c)(1)(A) and Section 706. Rather, read in conjunction with Section 10, the Section 706 statutory language ("utilizing . . . regulatory forbearance") merely directs the Commission to exercise its Section 10 forbearance authority, among other permissible deregulatory tools, to promote advanced telecommunications.

U S West's forbearance argument is also incongruous with at least three other aspects of the 1996 Act. First, as cited above, Section 271(d)(4) states that the "Commission may not, by rule *or otherwise*, limit or extend the terms used in the competitive checklist" *Id.* at § 271(d)(4) (emphasis added). It is hard to fathom that Congress would have directed the Commission to strictly apply every element of Section 271, and yet, as U S West contends, Congress would permit the Commission to sweep away *all* Section 271 requirements through a Section 706 proceeding. Second, U S West's view of Section 706 regulatory forbearance authority would vest in the Commission almost unfettered discretion to eliminate or

⁵⁵ *Id.*

fundamentally change statutory requirements, which is at odds with Section 10 and with established precedent on the FCC's limited preemption authority. See, MCI v. AT&T, 114 S. Ct. 2223 (1994).

Finally, and equally strained, is U S West's argument that Section 706 forbearance would allow U S West to avoid section 271 requirements.⁵⁶ Although not stated, U S West presumably would request the Commission to do this through the Commission's authority under Section 3(25)(B) of the Act to "modify" geographic LATA boundaries.⁵⁷ U S West seeks a whole-scale *elimination* of LATA restrictions imposed by Section 271, and so the Commission's authority under Section 3(25) to approve a *modification* of specific LATA boundaries is inapposite in this proceeding.⁵⁸

⁵⁶ See MCI v. AT&T, 114 S. Ct. at 2229 (use of the word "modify" in Communications Act means to "change moderately or in minor fashion").

⁵⁷ Moreover, U S West's contention (at n.20) that eliminating LATA boundaries would be consistent with the MFJ Court's waivers is seemingly irrelevant. It is also mistaken because, as the MFJ Court explained in declining to permit Pacific Bell's ownership of interLATA transmission facilities, "the prohibition against Regional Company entry into interexchange business -- like that against entry into the information services business . . . -- lies at the heart of the decree." U.S. v. Western Elec. Co., 1986-1 Trade Cases 62,055, 62,060.

⁵⁸ Indeed, U S West's approach to LATA modifications would turn the Commission's precedent on its head. See, e.g., In the Matter of U.S. West for Limited Modification of LATA Boundaries, Memorandum Opinion and Order, File No. NSD-L-97-31, DA 98-433, ¶¶ 6-7 (CCB rel. March 4, 1998) (among other requirements, the Section 3(25)(B) LATA modification process requires prior state approval and a showing that the change of LATA boundaries would not undermine Section 271 objectives, "would not have a significant anticompetitive effect on the interexchange marketplace or on [Bell Company's] . . . incentive to open its local exchange and exchange access markets to competition").

2. U S West Fails To Adequately Demonstrate That The Commission Has Authority to Forbear from Section 272 or That Such Forbearance Is Warranted.

In a decision released just prior to U S West filed its Petition, the Common Carrier Bureau made clear that the Commission's Section 272 forbearance authority is limited by Section 10(d). The Bureau held: "[P]rior to their full implementation we lack authority to forbear from application of the requirements of Section 272 to any service for which the BOC must obtain prior authorization under Section 271(d)(3)," and, " that section 10(d), read in conjunction with section 271(d)(3)(B), precludes our forbearance for a designated period from section 272 requirements with regard to any service for which a BOC must obtain prior authorization pursuant to section 271(d)(3)."⁵⁹ Thus, until U S West obtains Section 271 approval to offer interLATA telecommunications and information services, the Commission has already held that it has no authority to forebear.

Even if one assumes, *arguendo*, that Section 706 is an independent source of forbearance authority, the Commission's action would have to "promote competition in the local telecommunications market." 1996 Act, § 706(a). However, the separations, nondiscrimination, transactional, and auditing obligations of Section 272 are each designed to promote local telecommunications. As the Commission explained in the Non-Accounting Safeguards Order,⁶⁰ the Section 272 safeguards "are designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting, while still giving

⁵⁹ "Bell Operating Companies' Petitions for Forbearance from the Application of Section 272," Memorandum Opinion and Order, CC Dkt. No. 96-149, DA 98-220 ¶¶ 22, 23 (CCB, rel. Feb. 6, 1998). Unlike U S West's request in this proceeding, the Bureau reasoned that it had authority to forbear from Section 272 because the E911 and reverse directory services service in question were a Section 271(f) "previously authorized" services. *Id.* at ¶ 25.

⁶⁰ Non-Accounting Safeguards Order at ¶ 9.

consumers the benefit of competition." Because U S West would exercise market dominance over local access lines used for xDSL service, it has every incentive to engage in exactly the sort of activity that Section 272 is meant to proscribe. Given this, it is difficult to discern how forbearance of U S West's Section 272 obligations would meet the statutory mandate of promoting local competition.

More broadly, CIX believes that Section 272 of the Act should not be swept away just two years after enactment simply because the Bell Operating Companies' today allege that they can improve some interLATA services. Congress implemented a specific statutory scheme of competitive safeguards for a specified period with a public policy for opening up the local telecommunications marketplace, and FCC should exercise extreme caution in second-guessing this Congressional decision.

B. U S West's Request for Exemptions From Unbundling, Resale, and Separations Obligations Would Substantially Frustrate Local Telecommunications and Internet Service Competition.

Section 706 requires the Commission to take "reasonable" actions in furtherance of the "public interest," and "measures that promote competition in the local telecommunications market." 1996 Act, § 706(a). CIX fully supports that statutory policy. CIX is confident that innovative telecommunications services will emerge when the ILECs have opened their monopoly access networks, and interconnect on fair and reasonable terms, as required by the 1996 Act.

However, U S West's request to provide xDSL services without regard to their unbundling, separations, resale, and pricing obligations would be wholly unreasonable, would violate the public interest as embodied by a host of Congressional and Commission policies, and would be fundamentally contrary to the furtherance of local competition. In CIX's view, what the U S West Petition seeks is to close all access to local data users for competing providers,

while maintaining its monopoly position over local telecommunications. This effort is fundamentally contrary to the public interest.

1. Neither ISPs Nor CLECs Would Have Unbundled Access to the Underlying Local Telecommunications Data Network

U S West asks for the Commission to exempt its xDSL local telecommunications services from unbundling requirements.⁶¹ However, the 1996 Act makes perfectly plain that U S West and other incumbent LECs must unbundle and provide access "at any technically feasible point," and offer all of its local telecommunications services for competing providers. 47 U.S.C. § 251(c)(3)&(d)(2). Congress defined "network elements" broadly, and did not limit the ILEC's unbundling obligations to only those elements of its network used exclusively for voice traffic. *Id.* at § 152(29) ("network element" means a facility or equipment used in the provision of a telecommunications service"). Thus, Congress has unequivocally laid down statutory law and a public policy for broad, open, and comprehensive access to the elements of the incumbent LECs' networks.

U S West also asks to be exempt from its Open Network Architecture ("ONA") and Comparably Efficient Interconnection ("CEI") unbundling obligations.⁶² Thus, competing ISPs would be denied access to the underlying telecommunications services that would be enjoyed exclusively by U S West's ISP affiliate. It is beyond question that such a regulatory exemption would flatly contradict the Commission's decades-long precedent to open local

⁶¹ U S West Petition at 1.

⁶² *Id.* at 35.

telecommunications to preserve a vibrant information service market for the benefit of the American consumer.⁶³

In both cases, unbundling serves a number of essential functions that are part of the federal policy framework to open up the local market. First, unbundling permits local telecommunications carriers to establish an early foothold in the marketplace, by allowing competitors to combine their own more limited facilities with the elements of the ILECs' ubiquitous network. In addition, unbundling ensures more competitive pricing of local retail services. If the ILEC attempts either to overcharge for a given retail service or, alternatively, to deploy inefficient elements in the provision of the service, then unbundling provides the competing provider with incentive to compete by purchasing all UNEs of a given service at cost (in the former case) or purchasing some UNEs and recombine them with more efficient elements (in the latter case). While U S West claims that unbundling of certain xDSL equipment allows competitors to benefit from U S West's investments and innovations without risk,⁶⁴ the essential role of UNE rights as a systemic check on ILEC pricing. Further, the Commission has held that the availability of an element from a source other than the ILEC does not relieve the ILEC of its unbundling obligations. "Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." Local Competition Order, at ¶ 283.

⁶³ See "Computer III Further Remand Proceedings," Further Notice of Proposed Rulemaking, CC Dkt. Nos. 95-20, 98-10, FCC 98-8, at ¶ 78 (rel. Jan. 30, 1998). ("ONA unbundling requirements serve both to safeguard against access discrimination and to promote competition and market efficiency in the information services industry.")

⁶⁴ U S West Petition at 36.

Similarly, ONA unbundling serves the public interest because it allows competing information service providers to recombine telecommunications elements for more efficient, or niche, services that the ILEC may be unwilling to furnish. As the Commission noted in the 1990 ONA Remand Order, ONA serves the public interest because it allows ISPs to make more efficient use of the LEC network:

A major goal of ONA is to increase opportunities for ESPs to use the BOCs' regulated networks in highly efficient ways, enabling them to expand their markets for their present services, and develop new offerings as well, all to the benefit of consumers . . . promotion of efficient use of the network is one of the primary goals of the Communications Act.⁶⁵

Finally, an exemption from unbundling requirements *at this time* would be particularly pernicious. To date, U S West has failed to demonstrate that competing ISPs or CLECs would have any other local ADSL access options available to get to the end-user customer. See Part II(B-1), *infra*. U S West Petition also claims that it does not "seek to avoid its obligation to make bottleneck facilities (such as local loops over which digital subscriber line services operate, or central-office collocation space) available to its CLEC competitors."⁶⁶ However, it cannot at this time demonstrate compliance with its UNE and other local competition obligations by meeting the Section 271 checklist. U S West's recent removal of its LADS offering adds further doubt to its commitment to open bottleneck facilities. (see p. 17; *infra*). To grant U S West's Petition now, before it has opened its network for UNE competition, would be to trade local competition for a promise for innovation.

⁶⁵ In the Matter of Computer III Remand Proceedings, Report and Order, 5 FCC Rcd. 7719, 7720 (1990) ("ONA Remand Order"), *aff'd*, California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

⁶⁶ U S West Petition at 4.

2. No True Competitive Market for the Provision of xDSL
Would Emerge Without Resale

It is readily apparent from the statutory structure that Section 251(c)(4)(a) resale obligations complement the ILECs' unbundling obligation to ensure a more competitive local telecommunications market. Together, the two obligations permit providers to compete with the ILEC either by (a) recombining UNEs (which would likely entail interconnection and collocation) or (b) purchasing the ILECs' total retail service at cost, minus the ILECs' "avoided" costs. For the same reasons that the UNE obligation keeps consumer prices competitive, as discussed above, the wholesale resale obligation also serves the Congressional intent to encourage local competition.

Further, CIX believes that it is especially important for the Commission to keep the resale obligation intact for xDSL services. The resale obligation will ensure that xDSL is not a repeat of the ILECs' pricing decisions that delayed the deployment of ISDN: with the resale obligation, the ILECs cannot effectively stall the deployment of this new technology through excessively high tariff pricing. In addition, CIX believes that xDSL services may pose technical issues that would make it more difficult for competing providers to arrange easy and effective interconnection arrangements with the ILEC. For example, CIX is aware that certain proposed xDSL arrangements would move the service further into the switch, making unbundled access more cumbersome. If such problems are borne out in the market, use of the resale obligation will be especially critical for competing providers.

Finally, CIX notes that many ILECs, including U S West, are active participants in the ADSL Forum, which is comprised of all the major hardware and software developers of xDSL. U S West and a select group of computer software and hardware giants are now engaged in the ongoing development of the technical and architectural characteristics of xDSL services. This position combined with its purchasing power over switch and equipment manufacturers, provides U S West with ample business incentives to promote technical solutions favoring their own

switch deployment, and hindering access to xDSL elements by competing providers. Thus, the wholesale resale obligation will function as a check against such potential design and deployment activities that are inimical to local competition for xDSL services.

Conclusion

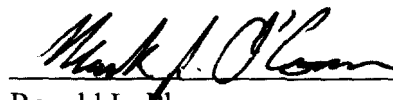
For the foregoing reasons, CIX believes that the Commission should dismiss the U S West Petition. The competitive provision of advanced telecommunications services, such as xDSL, cannot be achieved in the manner outlined by U S West. Instead, the grant of the U S West Petition would frustrate the ability of other telecommunications providers to bring competition to U S West's in-region markets, and would significantly harm the ability of independent ISPs to continue to enrich the Internet services enjoyed by American consumers.

Respectfully submitted,

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NEC Corporation
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netINS, Inc.
NETRAIL
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Osaka Media Port Corporation
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Telewest Communications, Ltd.
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TheOnRamp Group, Inc.
Thoughtport
Threeweb Corporation
TogetherNet
Tokai Internetwork Council
Tokyo Internet Corporation
Total Connectivity Providers
Toyama Regional Internet
Organization
U-NET Ltd.
USIT United States Internet, Inc.
UUNET PIPEX
UUNET Technologies
USAGate
VBCnet (GB) Ltd
Verio
VoiceNet
Voyager Networks, Inc.
Web Professionals
WebSecure
Wyoming.com

Figure 1

Predominate Current Residential Internet Architecture (PSTN)

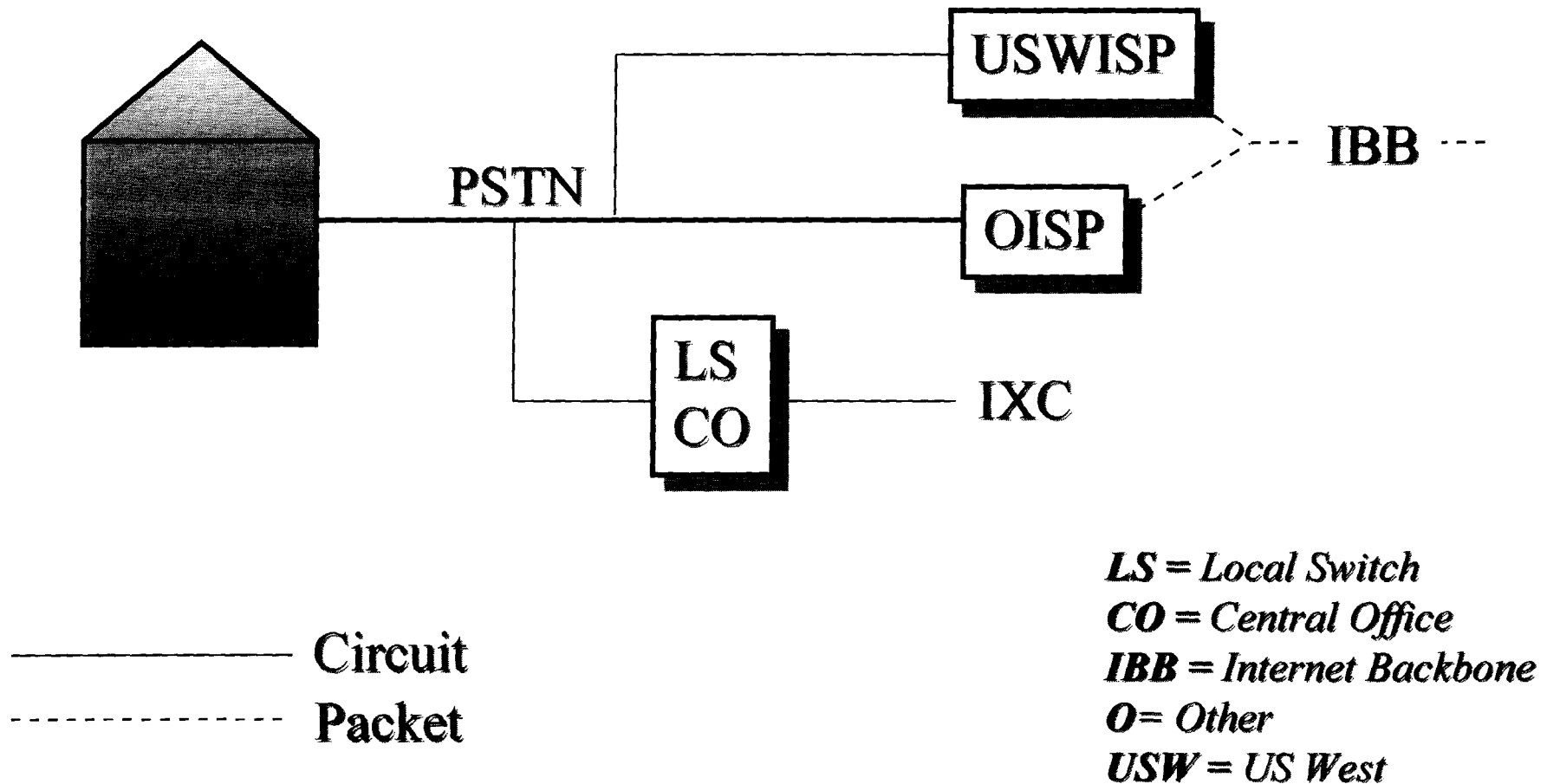
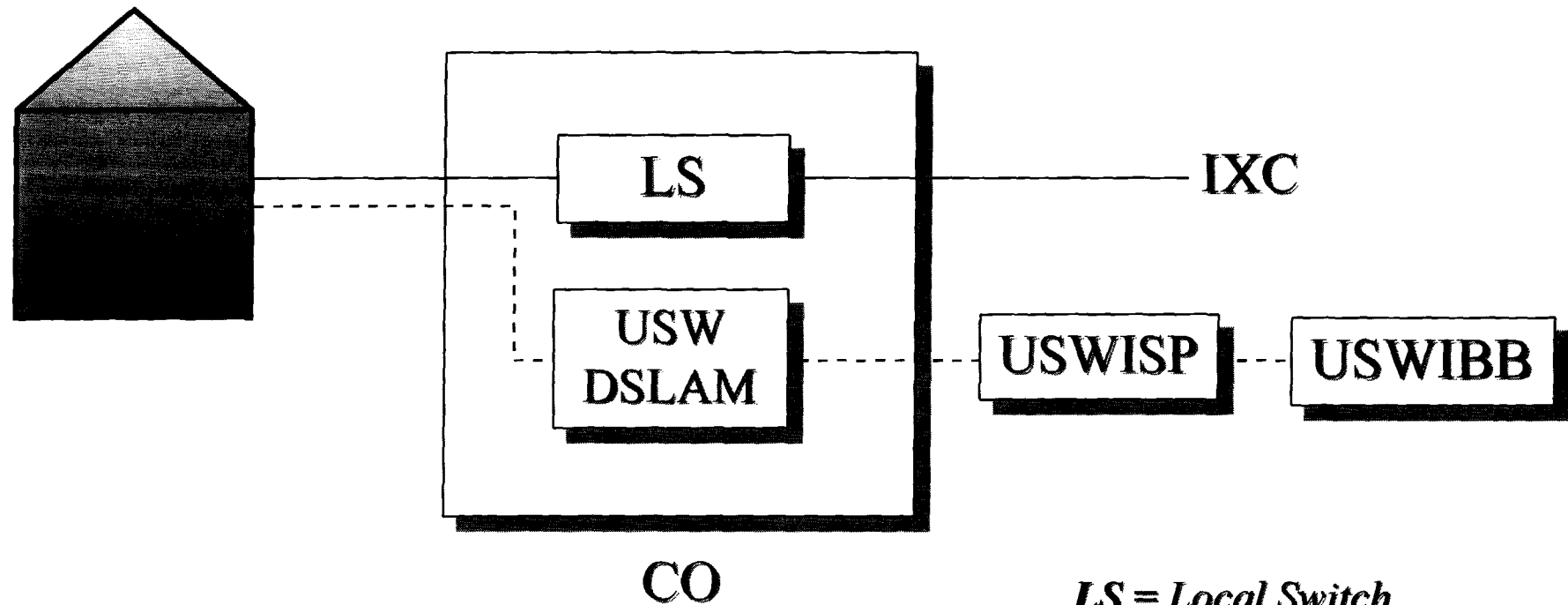


Figure 2 US West ADSL Model



———— Circuit
----- Packet

LS = Local Switch
CO = Central Office
IBB = Internet Backbone
O = Other
USW = US West

Figure 3 CIX ADSL Model

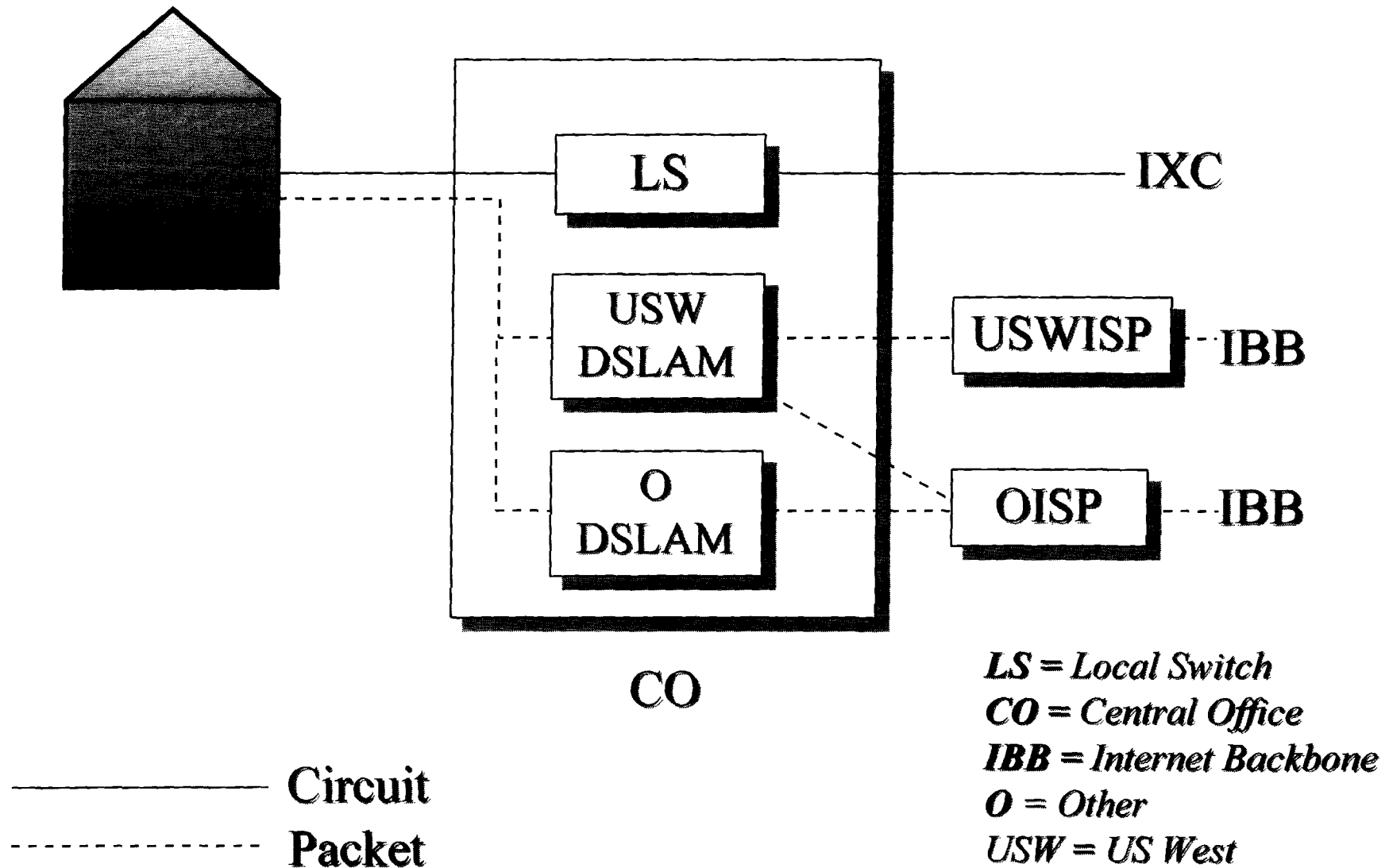
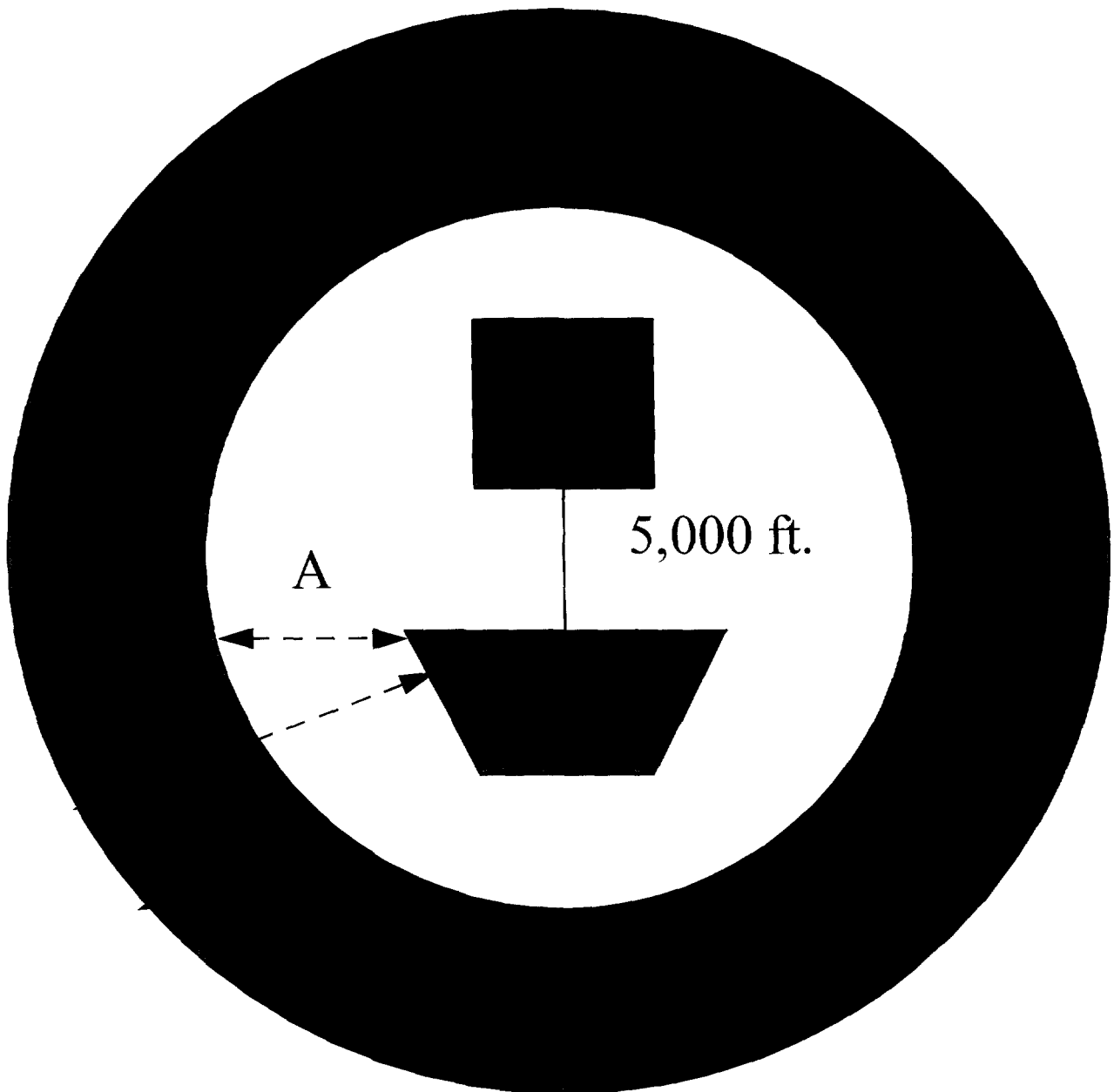


Figure 4
ADSL and the Collocation Issue



- A = The radius that non-collocated independent ISPs may use ADSL to connect to customers (e.g. 13,000 ft.).
- B = The radius that the collocated ILEC-affiliated ISP may use ADSL to connect to customers (e.g. 18,000 ft.).
- C = The region of the market in which the ILEC-affiliated ISP would enjoy exclusive access to customers via ADSL.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was this 6th day of April, 1998 hand delivered or mailed, postage prepaid to the following:

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